Report of the Department of Justice Concerning Its Investigation and Prosecutorial Decisions with Respect to Central Intelligence Agency Mail Opening Activities in the United States

The Department of Justice has decided, for reasons discussed in this report, not to prosecute any individuals for their part in two programs involving the opening of mail to and from foreign countries during the years 1953 through 1973.

On June 11, 1975, the President transmitted to the Attorney General the Report of the Commission on CIA Activities within the United States (the Rockefeller Commission). The President asked the Department of Justice to review the materials collected by the Commission, as well as other relevant evidence, and to take whatever prosecutorial action it found warranted. At the direction of the Attorney General, the Department's Criminal Division conducted an investigation to determine whether any government officer or employee responsible for CIA programs described in Chapter 9 of the Commission Report, involving the opening of mail taken from United States postal channels, or responsible for related or similar activities of the Federal Bureau of Investigation, had committed prosecutable offenses against the criminal laws of the United States. Such an investigation was immediately begun by the staff of the Criminal Division and regular reports on its status were made to the Attorney General.

On March 2, 1976, the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities acceded to the Department's request that the Criminal Division be allowed access to the documentary evidence in its possession

concerning the projects. In August 1976 the Criminal Division submitted to the Attorney General a report summarizing the evidence it had acquired, and analyzing the legal questions that potential prosecutions would present. The report concluded that it was highly unlikely that prosecutions would end in criminal convictions and recommended that no indictments be sought.

Because of the importance of this recommendation and its conclusion that a prosecution would so likely fail, the Attorney General and the Deputy Attorney General asked the Criminal Division to review its analysis and findings, and in addition asked experienced criminal lawyers in the Tax Division to undertake a review. As part of the review process, three experienced United States Attorneys, and two specially appointed consultants, Professors Herbert Wechsler and Philip B. Kurland, were asked to participate in an evaluation of the recommendations with the Attorney General, the Deputy Attorney General, the Solicitor General, and the Assistant Attorney General for the Criminal Division.1/

1/ In the course of these deliberations, it became clear that no decision to prosecute could responsibly be made on one of the two mail opening projects -- the West Coast Project which is described on pages 20-21, infra -- within the five year statute of limitations set forth in 18 U.S.C. §3283. In any event, it was the unanimous view that, because the West Coast Project was of relatively brief duration, small in scale, and directed only to incoming mail, any potential prosecution inevitably would focus on the CIA's East Coast mail openings, described on pages 7-19. These openings ended in early 1973, and only the last year of the project is within the statute of limitations. This is enough, however, to allow a prosecution to be commenced with respect to these acts and the entire agreement, dating to 1953, to open mail.

The Department has now completed its investigation into the mail opening projects and has examined in detail the elements of the crimes that may have been committed, the defenses that might be presented, and the proof that would be required to establish the commission of crimes and refute the expected defenses.

Although the Department is of the firm view that activities similar in scope and authorization to those conducted by the CIA between 1953 and 1973 would be unlawful if undertaken today, the Department has concluded that a prosecution of the potential defendants for these activities would be unlikely to succeed because of the unavailability of important evidence 2/ and because of the state of the law that prevailed during the course of the mail openings program.

It would be mistaken to suppose that it was always clearly perceived that the particular mail opening programs of the CIA were obviously illegal. The Department believes that this opinion is a serious misperception of our Nation's recent history, of the way the law has evolved and the factors to which it responded -- a substitution of what we now believe is and must be the case for what was. It was until recent years by no means clear that

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2/ Important evidence would be missing because of the great length of time between the commencement of the mail openings and the holding of a potential trial. Many important participants in the process have died, and because some of the events occurred a generation ago, the memories of other witnesses

the law and, accordingly, the Department's position, would evolve as they have. A substantial portion of the period in which the conduct in question occurred was marked by a high degree of public concern over the danger of foreign threats. The view both inside and, to some extent, outside the government was that, in response to exigencies of national security, the President's constitutional power to authorize collection of intelligence was of extremely broad scope. For a variety of reasons judicial decisions touching on these problems were rare and of ambiguous import. Applied to the present case, these circumstances lead to reasonable claims that persons should not be prosecuted when the governing rules of law have changed during and after the conduct that would give rise to the prosecution. They also would support defenses, such as good faith mistake or reliance on the approval of government officials with apparent authority to give approval. Whether these arguments would be acceptable legal defenses is not necessarily dispositive. As Judge Leventhal has reminded us: 3/

> Our system is structured to provide intervention points that serve to mitigate the inequitable impact of general laws while avoiding the massive step of reformulating the law's requirements to meet the special facts of one harsh case. Prosecutors can choose not to prosecute, for they are expected to use their "good sense. . .conscience

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3/ United States v. Barker, C.A.D.C., No. 74-1883, decided May 17, 1976 (dissenting opinion), quoting from United States v. Dotterweich, 320 U.S. 277, 285 (1943).

and circumspection" to ameliorate the hardship of rules of law. Juries can choose not to convict if they feel conviction is unjustified, even though they are not instructed that they possess such dispensing power.

These factors would make difficult a showing of personal guilt. The issue involved in these past programs, in the Department's view, relates less to personal guilt than to official governmental practices that extended over two decades. In a very real sense, this case involves a general failure of the government, including the Department of Justice itself, over the period of the mail opening programs, ever clearly to address and to resolve for its own internal regulation the constitutional and legal restrictions on the relevant aspects of the exercise of Presidential power. The actions of Presidents, their advisors in such affairs, and the Department itself might have been thought to support the notion that the governmental power, in scope and manner of exercise, was not subject to restrictions that, through a very recent evolution of the law and the Department's own thinking, are now considered essential. In such circumstances, prosecution takes on an air of hypocrisy and may appear to be the sacrifice of a scapegoat -- which increases yet again the likelihood of acquittal. And in this case, an acquittal would have its own costs -- it could create the impression that these activities are legal, or that juries are unwilling to apply legal principles rigorously in cases similar to this.

Where a prosecution, whether successful or not, raises questions of essential fairness, and if unsuccessful could defeat the establishment of rules for the future, the Department's primary concern must be the proper operation of the government for the present and in the future. The Department of Justice has concluded, therefore, that prosecution should be declined. At the same time, however, the need of eliminating legal ambiguities and of guiding future conduct in this field demands a precise public statement of the Department's position on the law -- namely, that any similar conduct undertaken today or in the future would be considered unlawful. Ordinarily public announcements of reasons for declining prosecution are not made, for they may invade the privacy of the potential defendants and charge them with misconduct while denying them an opportunity to respond in court. The circumstances of this case justify an exception to that rule. Publication of the Rockefeller Commission and Senate Select Committee reports, with their extensive descriptions of the mail opening programs, substantially diminishes any harm to the potential defendants' reputations that could be caused by public explanation of the Department's position. The harm is further diminished by the description of the circumstances and the considerations of fairness on which the Department's decision not to prosecute ultimately rests.

I. SUMMARY DESCRIPTION OF ORIGINS, CONDUCT AND TERMINATION OF CIA MAIL OPENING ACTIVITIES IN THE UNITED STATES.

Investigations conducted by the Rockefeller Commission, the Senate Select Committee, and the Department of Justice disclose that between 1953 and 1973 the CIA engaged in five separate projects involving the opening of mail in United States postal channels. The "East Coast Project" began in 1953 and ended early in 1973; the "West Coast Project" was carried out intermittently from 1969 to 1971. Three remaining projects were of brief duration and ended more than a decade ago. Prosecution for violations arising out of all but the East Coast Project is barred by the statute of limitations.

A. East Coast Mail Project

In 1952 the CIA, investigating the possibility of gaining positive and operational intelligence information from first-class mail to or from the Soviet Union, found that all such mail was sent through postal facilities in the New York City area. Postal inspectors were contacted and, with their cooperation, plans were made for CIA personnel to conduct surveillance of United States-Soviet mail.

In February 1953, when the program was implemented, CIA personnel from the Office of Security were permitted to examine and copy (by hand) information from envelope exteriors

under the close supervision of a postal inspector, but they were admonished that the mail could not be tampered with or delayed. From the very outset of this operation, however, the CIA planned to convert the project into a mail opening operation. The major obstacle to accomplishing this goal was the constant presence of a postal inspector. The CIA thought that if it could establish procedures to photograph the exterior of the mail, it could obtain relatively unsupervised access to the mail.

Such an expansion of the operation required contact by Director of Central Intelligence ("DCI") Allen Dulles with postal officials. An undated memorandum prepared by the CIA's Director of Security in late 1953 noted that the New York mail operation was at that time confined to the inspection of covers only. It recommended that the project be discussed as soon as possible with the President and that a secret White House directive be issued jointly to the Central Intelligence Agency and the Post Office Department requesting those organizations to make a "study" on the subject of the censorship of foreign mail. The memorandum noted that the CIA could then disclose its desires and requirements to the Post Office Department and take steps to implement the program on an expanded scale. This memorandum was not formally transmitted to Dulles but, on January 4, 1954, the Director of Security forwarded

a memorandum to Dulles which recommended that CIA seek expanded access to the mails from the Postmaster General for the purpose of photographing covers; the Director of Security also recommended that the "oral approval" of the President be obtained.

In May 1954 Director Dulles, accompanied by then Chief of Operations Richard Helms, briefed Postmaster General Arthur Summerfield about the CIA's desires for expanded access and means to photograph envelope exteriors. The Chief Postal Inspector agreed to permit such photographing. A contemporaneous CIA memorandum of that briefing makes no reference to any discussion of mail openings. The Chief Postal Inspector specifically recalled, in a 1975 interview, that DCI Dulles argued that the Soviets opened mail and, therefore, that the CIA's efforts were unfairly circumscribed by American postal practices. However, the Inspector, now deceased, recalled that he had told DCI Dulles that any opening of letters would, in his view, be a violation of postal law.

Following this briefing, the CIA obtained private rooms at two New York postal facilities. Although some information suggests that a very few selected openings may have occurred as early as July 1953, available evidence indicates that the selective opening and reading of letters with some regularity began in late 1954.

The Department has been unable conclusively to establish whether, as recommended in the January 4, 1954, memorandum, and as suggested by certain individuals in testimony before the Rockefeller Commission and Congress and in statements to Department representatives, the CIA obtained authorization from President Eisenhower to open and read mail. There is, however, evidence suggesting that President Eisenhower had knowledge of and had approved the CIA's East Coast operation.

Opinions regarding President Eisenhower's knowledge and approval were expressed by close associates of both President Eisenhower and DCI Dulles. Their judgments are based on experience with government operations, and their own knowledge of the individual characteristics and habits of Eisenhower and Dulles. For example, one high level official stated that no substantial CIA operation would have been undertaken without at least tacit White House approval. Another expressed the opinion that the CIA mail operation was the type of operation which would have been cleared with President Eisenhower by Allen Dulles. This same official recounted a Cabinet level discussion with President Eisenhower in which the reading of incoming Soviet mail was raised, but he was uncertain about the context in which the subject was discussed. Still another official in the Eisenhower Administration said it is "inconceivable" that Allen Dulles would

have embarked on any program as sensitive as the East Coast mail intercept without first informing the President. Former associates of Allen Dulles stated that Mr. Dulles was most conscientious about keeping President Eisenhower informed of the operations of the CIA.[4/] A former close associate of Mr. Dulles indicated that in about 1960 he was officially advised by a Dulles assistant that Mr. Dulles had informed President Eisenhower of the CIA's mail intercept project.

The absence of any conclusive evidence of presidential authorization should be considered in light of the well-observed, but seldom discussed, practice described as "plausible deniability" or "presidential deniability." Knowledgeable witnesses have noted that there existed in high government circles a long-standing aversion to making written records of presidential authorizations of sensitive intelligence-related operations.[5/] It was thought that the conduct of foreign

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4/ Foreign intelligence matters were of great interest to President Eisenhower, and he frequently consulted with DCI Allen Dulles and his brother, Secretary of State John Foster Dulles, concerning such matters.

5/ An example of this practice is the handling of the U-2 matter. According to high level officials, President Eisenhower personally approved all U-2 overflights, including the one in which an American pilot was shot down over Soviet territory just before the 1960 Paris summit conference. One former Eisenhower aide had first-hand knowledge that President Eisenhower made his U-2 approvals orally, and that no written records of such authorizations were made.

affairs frequently required the practice of non-recordation of such presidential authorizations. Covert actions were, by National Security Council definition, designed so that the United States Government could plausibly disclaim any responsibility for them. The concept of plausible or presidential deniability had been extended by interpretation, custom and usage to cover all sensitive intelligence activities. Moreover, the minutes of the President's Foreign Intelligence Advisory Board contain expressions of concern covering the relevant period from 1956 onward. For example, the minutes contain such phrases as "the President's shield," and "need to protect the President against public identification with . . . covert activities or intelligence activities," and "for security reasons, every effort would be made to leave no papers with the President."

In 1955 responsibility for the East Coast Project was given to the Counterintelligence (CI) Staff of the CIA. An outline of the funding, staffing and other logistical needs of the East Coast Project noted that foreign espionage agents relied upon the United States policy of respecting the sanctity of the mails and that these agents used the mails for espionage purposes to the detriment of the United States. It noted that, although the project did not contemplate censorship, discreet monitoring (opening) would be conducted and that under CI staff management "more letters will be opened."

In 1958 the FBI was advised of the existence and extent of the CIA's East Coast mail project, and the CIA offered to share the project's "take" with the FBI. FBI Director Hoover gave his approval, and the FBI provided the CIA with the names and categories of persons or organizations in which it had an espionage or counterespionage interest. Such lists were used as additional guides by the CIA in making selections from the United States-Soviet mail that passed through the CIA checkpoint.

On February 15, 1961, following the election of President Kennedy, DCI Allen Dulles, Deputy Director of Plans Richard Helms, and another CIA officer met with newly appointed Postmaster General J. Edward Day. According to Mr. Day's recollection, Dulles said he came to tell him of "something secret" regarding the CIA and the mails. Exactly what Day was told is not clear. A contemporaneous CIA memorandum of the 1961 meeting strongly suggests that Day was told by Dulles of mail openings being made by the CIA. On the other hand, in 1975 Day averred that, while his memory of the 1961 meeting might be faulty, he recalled that Dulles offered to tell him of a secret CIA mail operation but that he (Day) declined the invitation to be briefed. Day, however, remains uncertain. Three months later DCI Dulles approved continuation of the project on the basis of its value to the intelligence operations of the CIA.

The Department's investigation has not definitively established whether Presidents Kennedy and Johnson were aware of the East Coast Project. President Eisenhower authorized Allen Dulles to brief President-elect Kennedy on all significant intelligence operations conducted by the CIA and other intelligence agencies. President-elect Kennedy met with Mr. Dulles on several occasions during and after the transition period to discuss such operations, but the Department has not been able to determine whether the East Coast Project was covered during the briefings.

In 1965, prompted by hearings held by Senator Edward V. Long concerning possible legislation to abolish mail covers by federal agencies, a high CIA official learned that President Johnson apparently had not been briefed on the East Coast Project and "gave instructions that steps should be taken to arrange to pass (information concerning the project) through McGeorge Bundy to the President after the (Long) Subcommittee has completed its investigation." Mr. Bundy does not recall being informed of the East Coast Project, and no documentary record that indicates such instructions were carried out has been found. Richard Helms testified that he believes he may have advised President Johnson of the East Coast project in the spring of 1967 at a meeting during which the President requested information concerning sensitive CIA operations. Again, no direct evidence corroborating or refuting Mr. Helms' statements has been located.

Interviews with former high level officials within the Kennedy and Johnson Administratons, however, disclose that Presidents Kennedy and Johnson were briefed on a regular basis by CIA officials about sensitive CIA operations. One former Cabinet official in both the Kennedy and Johnson Administrations stated that he was aware that mail openings were being conducted in the United States, although he did not know details of particular projects or their scope. The Cabinet officer stated that he believed Presidents Kennedy and Johnson were generally aware that the CIA was engaging in operations similar to the East Coast Project.

Interviews of individuals who served as members of the President's Foreign Intelligence Advisory Board (PFIAB) during the Kennedy and Johnson Administrations indicate that these individuals were aware of domestic mail openings by the CIA and FBI. PFIAB had the responsibility to review and assess the activities of the CIA and other agencies with foreign intelligence responsibilities and to advise the President on such matters. One PFIAB member, who served until 1968, stated that the PFIAB gave detailed briefings to the President; moreover, he stated his belief that the President would "have to be in a fog" to be unaware of the fact that techniques such as mail openings were being used. Again, however, the practice of "plausible deniability" was frequently raised by

persons knowledgeable of government intelligence practices as a possible explanation for the absence of any written records of presidential knowledge or authorization for the East Coast Project.

With the inception of Operation CHAOS, designed to determine the extent of hostile foreign influence on domestic unrest, the East Coast Project assumed a new intelligence-related purpose. In addition to Operations CHAOS, the project sought to develop positive foreign intelligence, such as information on Soviet crop and living conditions and population movements. Moreover, operational support intelligence was sought such as information on the postal censorship and secret writing techniques of the USSR, and there was a counter-intelligence purpose to assist the United States in meeting and neutralizing Soviet intelligence activities.

In July 1969 the CIA Inspector General's staff examined the East Coast Project and recommended that, although President Eisenhower apparently had authorized the project, if the CIA were to continue to administer the project, senior officials within the Nixon Administration should be briefed.

In 1969 William Cotter, a former CIA employee aware of the East Coast Project, was appointed Chief Postal

Inspector. Concerned that other top level postal officials were unaware of the project, in 1970 Cotter informed the CIA that either the Postmaster General would have to be apprised of the East Coast Project or it would have to be discontinued. Cotter pressed his request in January 1971. This caused a reevaluation of the merits of the East Coast Project. A CIA memorandum dated March 29, 1971, strongly urged continuation of the project, describing it as "an irreplaceable tool for the exercise of the Agency's counterintelligence responsibility." The memorandum noted that the counterintelligence information developed by the project was also of assistance to "the White House, the Attorney General and the FBI."

The CIA's senior officials decided to continue the project. In June 1971, to meet Cotter's concerns, Director of Central Intelligence Helms separately briefed both Attorney General John Mitchell and Postmaster General Winton Blount. There is dispute as to what the briefings encompassed. A contemporaneous CIA memorandum indicates that Mitchell and Blount were informed of the East Coast Project and agreed to its continuation; Helms testified before the Rockefeller Commission that he informed them fully

about the nature and scope of the mail opening project. Mitchell and Blount, though they acknowledge that there may have been a general discussion of mail covers, state that they were not informed about the opening of mail.

Former President Nixon has stated that he was aware of the CIA's monitoring of mail between the United States and the Soviet Union and the Peoples' Republic of China, but he disclaims any knowledge of mail openings, and the Department has uncovered no direct evidence which suggests that former President Nixon was ever specifically informed of the mail opening projects. It appears, however, that during the Nixon Administration the White House was receiving intelligence reports that enabled White House officials to determine that mail was being opened. John D. Ehrlichman, a White House official in the Nixon Administration, testified before the Senate Select Committee that, from his reading of intelligence reports, he was able to determine that mail was being intercepted, presumably by the CIA.

With the resignations of Postmaster General Blount in 1971 and Attorney General Mitchell in 1972, Chief Inspector Cotter again believed himself to be the only

senior government official outside the CIA and FBI with knowledge of the East Coast Project. He again informed CIA officials that, unless higher level approval for the project was obtained by February 15, 1973, he would withdraw the Postal Service's cooperation. James Schlesinger, who had succeeded Helms as DCI, decided that the foreign intelligence and counterintelligence information derived from the project did not outweigh the risk of embarrassment and potential public repercussions presented by its continuation. On February 15, 1973, the East Coast Project was suspended and, in effect, terminated.

Whether the failure of the Department's investigation to uncover any direct evidence, written or oral, of presidential knowledge or authorization was caused by the nonexistence of such knowledge or authorization, by confusion of mail openings with "mail covers," which were generally viewed as legitimate, or by the passage of time and the "presidential deniability" concept discussed above, cannot be determined. However, on the existing record, the government could not prove in a criminal prosecution beyond a reasonable doubt that the East Coast Project was conducted without presidential approval or without presidential knowledge and acquiescence.

B. West Coast Project

The West Coast Project was proposed in 1969 by CIA officials within the CIA's Plans Directorate for the purpose of obtaining foreign intelligence concerning the Peoples' Republic of China. The CIA was particularly interested in censorship techniques used by the Peoples' Republic of China, and the project was intended to evaluate such techniques through a survey of mail entering the United States from the Peoples' Republic of China. Initially, it was contemplated that the project would entail only the inspection of envelope exteriors. Approval of the project by postal officials was secured for a survey of envelope exteriors.

The West Coast Project, conducted in or near San Francisco, involved four separate surveys of mail between 1969 and 1971. The first survey took place in September, 1969 and lasted five days. Approximately 1,600 envelopes of incoming mail were screened during this period. No mail was opened in this initial survey, which apparently was undertaken without approval by top level CIA officials. The lower level officials responsible at that time for the project deemed this initial survey successful and concluded

that a broader scale survey of mail should be undertaken in order to evaluate Chinese intelligence techniques. During 1970 and 1971, three additional surveys were conducted by CIA officials in San Francisco, each lasting two or three weeks. In each of these surveys, only incoming mail from the Peoples' Republic of China was opened, apparently without the knowledge of the postal officials who cooperated by providing CIA officers with access to the mail. Approximately 550 pieces of mail were opened by the CIA during the course of the project. After the project's 1971 phase, no further West Coast operations were undertaken.

II. GROUNDS FOR PROSECUTION, POSSIBLE DEFENSES, AND EQUITABLE CONSIDERATIONS

A. Grounds for prosecution.

The Department of Justice has considered two statutory bases for prosecution of persons who participated in the East Coast Project. The first, 18 U.S.C. § 1702, prohibits the unauthorized opening or obstruction of mail in United States postal channels; the second, 18 U.S.C. § 241, proscribes conspiracies to deprive United States citizens of rights guaranteed by the Constitution. Under the general conspiracy statute, 18 U.S.C. § 371, liability would extend to persons who agreed to take part in violations of sections 241 or 1702, whether by opening the mails, by approving the openings, or by acting in concert with others who opened the mails.

A prosecution under section 241 requires proof of a violation of rights conferred on American citizens by the Constitution or laws of the United States; with regard to the mail openings, the prosecution would be premised upon a violation of the Fourth Amendment's prohibition against unreasonable searches and seizures. A prosecution cannot be maintained under section 241, however, unless it can be established that the defendants acted, or agreed to act, with the purpose of invading rights or interests protected by

the Constitution or by federal laws and that, at the time the defendants acted, protection of the right or interest violated had been "made definite by decision or other rule of law."[6/] Weaknesses in the evidence and the difficulty of establishing the absence of presidential authorization suggest that the Department would not be able to meet the burden of establishing, beyond a reasonable doubt, that the defendants acted with the "specific intent" required by section 241 as interpreted by the Supreme Court. Moreover, it is doubtful that, at the time the defendants acted, the Fourth Amendment forbade their actions with sufficient clarity to be "definite;" between 1953 and 1973 there was substantial evolution of Fourth Amendment law, as discussed later in this Report.

In a prosecution under section 1702 the Department would not be confronted with similar difficulties. All that is required to establish a prima facie violation of section 1702 is a showing that (a) the defendant opened mail in postal channels with "design to obstruct the correspondence, or to pry into the business or secrets of another" and (b) the defendant lacked lawful authority to do so.

6/ See Screws v. United States, 325 U.S. 91 (1945). See also United States v. Price, 383 U.S. 787, 806 n. 20 (1966); Anderson v. United States, 417 U.S. 211 (1974).

Whether the openings of mail in the present case violated section 1702 depends upon two related points: First, was authorization, from a person empowered to give such authorization, obtained for the East Coast Project?[7/] Second, if some authorization was obtained, was it effective? Resolution of the latter question requires a consideration of whether the Fourth Amendment to the Constitution permits officials of the Executive Branch to authorize the opening and reading of international mail and, if so, under what conditions and by what means. We turn to a consideration of those problems.

B. The requirement of lawful authorization.

Some courts have treated section 1702 as a specific intent statute, which would make prosecution overwhelmingly difficult. The Department of Justice believes, however, that a better view of the law is taken by the courts, which have treated it as a "general intent" statute, providing that persons shall not open envelopes moving through the mails. Its prohibition does not, however, extend to openings that have been lawfully authorized. Thus, other statutes (see, e.g., 19 U.S.C. §482) authorize the opening of envelopes under specified circumstances, and acting under its general powers the Postal Service

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7/ Since no statute authorizes the CIA to intercept or open mail in United States postal channels, legal authority for the East Coast Project could be derived only from powers granted to the President by Article II of the Constitution and delegated by him to the CIA or others.

itself opens envelopes when necessary to ascertain the address of the intended recipient. Indeed, unless there were an "authorized opening" exception, a law enforcement official who opened mail pursuant to a judicial warrant would violate the statute.8/ See United States v. Van Leeuwen, 397 U.S. 249 (1970). The Department of Justice consequently believes that the actions of the CIA in opening mail also would not violate section 1702, if those actions were properly authorized.9/

8/ An 1882 decision interpreting a statutory predecessor to section 1702 stated that "one is punishable who wrongfully, without any authority of law, or pretence of authority," interferes with the mail. United States v. McCready, 11 Fed. 225, 236 (W.D. Tenn. 1882).

9/ Neither section 1702 nor any other statute purports to take from the President, and the Executive Branch in general, any preexisting power to open and examine mail when necessary to the discharge of the President's constitutional responsibility for foreign affairs. Cf. United States v. Butenko, 494 F.2d. 593 (3rd Circ.) (en banc), certiorari denied, 419 U.S. 881 (1974), which holds that an analogous statute, although containing a broadly stated prohibition, does not affect presidential power to authorize surveillance when the Constitution otherwise permits it.

One other statute, 39 U.S.C. §3623(d), might be considered to do so. That statute forbids the opening of domestic first-class mail without a warrant. Nothing in the legislative history of section 3623(d) indicates that it was designed to affect the power of the President concerning foreign affairs. See, e.g., H.R. Conf. Rep. No. 91-1363, 91st Cong., 2d Sess. 88 (1970). Although section 3623(d) originated in the Espionage Act of 1917, 40 Stat. 230, it then contained only a statement that the Act did not affirmatively authorize the opening of mail. Moreover, it applies only to letters of "domestic origin," and so would not affect the opening of mail entering the United States from abroad. Finally,
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9/ Footnote continued from previous page.
section 3623(d) does not refer to section 1702 and does not provide criminal penalties for opening mail without a warrant. Nothing in the legislative history of the enactment of section 3623(d) indicates that Congress believed that it was altering the elements of 18 U.S.C. §1702.

It would have been extraordinary for the Congress without discussion to have enacted a restriction upon the President's foreign intelligence surveillance power so obliquely when, in 1968, legislating with respect to the much greater invasion of privacy constituted by wiretapping, it carefully disclaimed any intent to affect this area -- partly in response to the concern that it might have no power to do so. See 18 U.S.C. §2511(3), which is discussed at length in the Keith case. The Department has not heretofore taken that view of the statute, and to do so for the first time in connection with the present prosecution would -- in addition to reaching only post-1970 activities -- raise the difficulties concerning fairness, the defense of mistake of law, and jury reaction discussed below in connection with newly imposed requirements regarding the character of presidential authorization.

The Department does not wish, however, to make a final determination concerning the future interpretation it will accord section 3623(d) in the distorting context of the present proceeding, where any position other than that set forth above would have the flavor of retroactive legislation. If in the future any mail opening, based on express, properly limited Presidential authority, is contemplated, we would regard as a necessary preliminary step to assure its lawfulness the issuance of an advisory opinion by the Attorney General concerning the effect of section 3623(d) upon section 1702.

We think it clear that the prosecution could not establish beyond a reasonable doubt, as it would be required to do, that the East Coast Project was not authorized by the President, or by someone entitled to act for the President. The effect this would have on the legality of the mail opening program has changed considerably over the last 20 years; the authorization (which the court would be required to assume if the prosecution could not prove lack of authorization beyond a reasonable doubt) may have been sufficient at the outset to satisfy the requirements of the Fourth Amendment, but the understanding of the requirements of that Amendment has not remained constant.

The CIA mail opening program was initiated and took shape during the 1950s. Later operations were a continuation of this program with changes in emphasis. During the 1950s, and well into the 1970s, the law concerning clandestine surveillance was quite different, and the requirement of prior judicial authorization was different. Indeed, until 1967 respected scholars argued that the judiciary was the wrong branch of government to make authorization decisions concerning any clandestine surveillance; until 1972 courts held that prior judicial scrutiny was unnecessary when the surveillance involved national security; and at the present

time the case law indicates that prior judicial scrutiny is not necessary when surveillance of foreign powers or their agents is involved.

The Supreme Court indicated long ago [10/] that sealed domestic mail may not be opened in the absence of a search warrant. This ruling was based upon the expectation of privacy enjoyed with respect to the contents of first-class mail; that privacy was guaranteed by statute, and courts held that other classes of mail could be opened without judicial authorization. Those who send or receive mail crossing the border of the United States do not enjoy the same expectation of privacy as those sending or receiving domestic first-class mail. Customs Service officers are permitted by law to open all envelopes for necessary inspections. [11/] There may also be other reasons why international and domestic mail should be treated differently.

10/ Ex parte Jackson, 96 U.S. 727 (1877).

11/ 19 U.S.C. §482.

The expectation of privacy in the contents of international mail therefore cannot easily be equated to the expectation of privacy in domestic mail.

No cases have dealt with the surreptitious opening of international mail to gather foreign intelligence or counterintelligence information, but there is a close analogy in the interception of wire communications. In neither case is property taken; in neither case is a person delayed or physically inconvenienced. But in both cases private communications are intercepted, and the constitutional question becomes whether this intrusion must be authorized in advance in a specified way.

The Supreme Court's first constitutional decision concerning wire interceptions was Olmstead v. United States, 277 U.S. 438, which was handed down in 1928. Olmstead held that telephone conversations could be overheard without prior judicial approval. The Court set out two major rationales for its holding; first, that the interception of wire communications does not "seize" anything within the meaning of the Fourth Amendment because there is no physical trespass and it does not prevent the parties from conversing; second, that the Fourth Amendment does not reach beyond the home or office to the whole world into which communications may be sent. Under the standards of Olmstead, which was the law when the CIA

mail opening programs began, there was apparently no constitutional need for judicial approval of a program of covert openings of international mail, so long as the mail was resealed and sent on to its destination without censorship.

The law established by Olmstead did not begin to change until 1961, when the Supreme Court decided in Silverman v. United States 365 U.S. 505, that the Fourth Amendment applied to a listening device or "bug" placed by physical trespass in the wall of an office, even though the device did not prevent conversations from taking place. Silverman, however, left the remainder of the Olmstead analysis untouched.

During these years there also were serious questions whether the judiciary was empowered under Article III of the Constitution to issue surveillance orders. Respected scholars[12/] and at least one Justice of the Supreme Court[13/] argued that surveillance orders issued ex parte were not part of a "case or controversy" if they were not part of a criminal prosecution, and so judges lacked power to issue them. They argued, as well, that surveillance orders could

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12/ See, e.g., Telford Taylor, Two Studies in Constitutional Interpretation: Search, Seizure, and Surveillance 77-93 (1969).

13/ Osborn v. United States, 385 U.S. 323, 353 (1966) (Douglas, J., concurring).

not be classified as "warrants" under the Fourth Amendment because they were not designed to seize identifiable things and were not "returned" to the issuing judge in the historical fashion. Other objections, too, were raised. Resort to the judiciary, it was said, would diffuse responsibility and accountability for surveillance; responsible executive officials should authorize surveillance when necessary, and the Constitution would not forbid this practice.14/

In 1967, in Katz v. United States, 389 U.S. 347, the Supreme Court both overruled Olmstead and indicated that judges were empowered to issue surveillance orders in criminal cases. Katz held that the Fourth Amendment protects people, not places, and that law enforcement officers ordinarily must obtain advance judicial approval before intercepting communications in which there is a legitimate expectation of privacy.

Katz, however, did not resolve the question of whether a judicial warrant was available in non-criminal cases or whether it was necessary when national security was involved. The Supreme Court did not speak to the latter question until June 19, 1972, when it decided United States v. United States District Court (Keith), 407 U.S. 297. The United States argued in that

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14/ See, e.g., Taylor, supra, at 90.

case that the requirement of prior judicial approval should not apply to surveillance carried out to gather information about domestic security and foreign intelligence -- an argument which would, of course, support the propriety of the CIA mail opening programs as well as of wire interceptions for that purpose. The Supreme Court rejected part of the argument and held that a warrant is required for electronic surveillance in domestic security investigations. The Court made it clear, however, that it was setting aside a lengthy history of contrary practice,15/ and that it was reserving for decision in the future all questions concerning the procedures required to be used to gather foreign intelligence.16/

The East Coast Project ended eight months after Keith was decided. Keith affected the propriety of warrantless foreign intelligence surveillance, but it did not decide it. Those courts which have decided the issue have upheld such warrantless surveillance, and the Department of Justice has consistently taken the position in the courts, before congressional committees, and in public statements that the President or the Attorney General may authorize limited electronic surveillance of foreign powers or their agents for foreign intelligence

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15/ 407 U.S. at 299, 310-311.

16/ 407 U.S. at 308-309, 321-322.

purposes.[17] The CIA mail opening program was not authorized with the care and clarity that current practices and, we believe, the Constitution now require. But these principles have evolved so rapidly during the last two decades that they would have sounded strange to those who initiated the program during the 1950s and continued it during the 1960s.

A retroactive application of newly enunciated Fourth Amendment principles to persons whose conduct took place before the principles were established could, of course, not deter like conduct; and it would be unfair to punish federal employees for doing things which, as the law then appeared, were not illegal. The Supreme Court has held that changes in Fourth Amendment law should not apply retroactively. United States v. Peltier, 422 U.S. 531 (1975). That principle surely applies to criminal prosecutions against those who may have transgressed the Fourth Amendment no less than it does to the application of the exclusionary rule, which was at issue in Peltier.[18]

17/ Compare United States v. Brown, 484 F.2d 418 (5th Cir. 1973), certiorari denied, 415 U.S. 960 (1974); and United States v. Butenko, 494 F.2d 593 (3d Cir.) (en banc), certiorari denied, 419 U.S. 881 (1974); with Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975) (en banc), certiorari denied, 425 U.S. 944 (1976).

18/ See also Wood v. Strickland, 420 U.S. 308, 321 (1975), which holds that certain executive officials are liable in damages for a violation of constitutional rights only if they act in "ignorance or disregard of settled, indisputable law ...."

The role of authorization and its legality also is affected by changes in the law of border searches. It has long been accepted that things crossing the border are governed by special rules allowing search.[19] These constitutional rules do not allow the government to subject a person to legal disabilities on account of his lawful communications,[20] but they allow federal officers to open the mail without warrants to look for contraband and dutiable items, including pornography.[21] These rules may affect the expectation of privacy surrounding international correspondence. Moreover, the international exchange of ideas, especially with citizens of potentially unfriendly powers, may be on a different footing from the domestic exchange of ideas.[22]

19/ See Cotzhausen v. Nazro, 107 U.S. 215 (1882); California Bankers Ass'n v. Shultz, 416 U.S. 21, 62-63 (1974).

20/ Lamont v. Postmaster General, 381 U.S. 301 (1965).

21/ United States v. Thirty-seven Photographs, 402 U.S. 363 (1971); United States v. 12 200 ft. Reels of Super 8 mm. Film, 413 U.S. 123 (1973).

22/ Kleindienst v. Mandel, 408 U.S. 753 (1972).

Until 1973 it was widely thought that the border search rules allowed the inland search of persons and vehicles near the border for contraband and dutiable items.23/ The large majority of courts uphold the legality of opening envelopes at the border. Six courts of appeals have held that Customs officers may open envelopes without probable cause or search warrants to search for contraband, although one court of appeals has held to the contrary. The Supreme Court may resolve the dispute in the coming months.24/ The scope of the "border search" exception to the warrant clause of the Fourth Amendment would certainly bear upon the legality of any authorization to inspect international mail.

The discussion so far has traced changes in the law, during and after the time of the mail openings by the CIA, that would affect the lawfulness of a properly authorized surveillance. The law also has evolved in recent years concerning the form an authorization must take and the restrictions that must be observed in exercising any authority delegated to approve the activities. Questions regarding the necessity for express delegations by the President of his constitutional authority and for periodic reexamination of

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23/ Almeida-Sanchez v. United States, 413 U.S. 266. The extent to which Almeida-Sanchez altered existing law is discussed in United States v. Peltier, supra, 422 U.S. at 539-542..

24/ United States v. Ramsey, certiorari granted October 4, 1976, No. 76-167.

the activities in light of the need for the information and the intrusiveness of the techniques employed have only recently been addressed. These questions arise, in this case, because the presidential authorization for the East Coast Project -- if there was such authorization -- may have been presumptive rather than express; that is, it may have been in accord with the well-established principle applied in other areas of the law that agency heads are deemed to have been delegated those inherent presidential powers necessary to meet the responsibilities of the agency. Moreover, the approval for the openings was not limited in time, and responsible officials apparently did not reexamine the program on a regular basis to determine whether it should be continued.

Although the President may, consistent with the Constitution, authorize certain forms of surveillance to gather foreign intelligence information without seeking prior approval from the Judicial Branch, the Department believes that the evolving law in this area requires such authorization to be express. The executive official to whom the power to approve such surveillance has been delegated must take steps to assure himself that the surveillance is reasonable under Fourth Amendment standards.

He must consider the nature of the surveillance and the need for the information sought in determining whether to approve the activity, and then he must periodically reexamine the activity to ensure that it continues to meet constitutional standards. In urging the courts to accept executive authorizations of surveillance, the Department has argued that in each instance the personal approval of the President or his delegate, such as the Attorney General, would be employed to ensure the degree of consideration and control necessary under the Fourth Amendment.[25/] Mr. Justice White, concurring in Katz, indicated that he would accept such executive approval of surveillance, but only if it was explicitly considered by responsible officials and properly delimited.[26/]

It was only recently, in United States v. Ehrlichman, that a court of appeals concluded that a warrantless foreign intelligence search may be authorized only by the President or Attorney General personally, and that the authorization must

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25/ See, e.g. the Brief for the United States in the Keith case.

26/ 389 U.S. at 364. See also the opinions in United States v. Brown, supra, and United States v. Butenko, supra.

meet standards of consideration and limitation similar to those the Judicial Branch would impose on itself. 27/

The law we have described is of recent vintage. As was pointed out earlier, it was far from clear until 1967 that the judiciary would become involved in issuing warrants for surveillance even in criminal cases. Not until after Katz did courts begin to consider and delineate the requirements of specificity, personal responsibility, and limited duration that today limit the exercise of Executive Branch powers. It seems fair to conclude that, at the time the East Coast Project began, it was assumed that the President could, without issuing explicit delegations of power, allow others to speak for him in this field. So far as the CIA was concerned, the words of anyone who appeared to be authorized to speak for the President had the same legal effect as the President's own words.

27/ No. 74-1882, D.C. Cir., decided May 17, 1976, slip op. 31. Ehrlichman involved an inexplicit mandate which gave a general instruction to accomplish a particular end but did not discuss the means or techniques to be used to reach that end. Unlike the Ehrlichman case, there was an aura of presidential authority permeating the mail opening program for the two decades in which the technique was used. In addition, the program was not carried out, as the physical search was in Ehrlichman, by "an amorphous, ad hoc unit with no tradition of public service and no clear lines of responsibility," slip op. at 30, but by the unit of government established by Congress for the conduct of foreign intelligence operations.

Although President Eisenhower passed upon many foreign intelligence projects himself, he allowed Allen Dulles to speak for him on others, and CIA personnel may reasonably have assumed that Dulles did so with regard to the East Coast Project. Presidents Kennedy and Johnson often spoke through their subordinates -- or at least appeared to do so in order to maintain "plausible deniability." Any CIA personnel who discussed the matter with Attorney General Mitchell might reasonably have assumed that President Nixon acted in this respect through the Attorney General. Until various courts rendered several decisions within the past year, there was little or no indication from the judiciary that Presidents (or their surrogates) were required to act through explicit, time-limited orders; 28/ the entire concept of "plausible deniability" taught the opposite.

28/ Indeed, even as late as 1976 the courts seemed to accept an implied authority in the Attorney General without a written delegation of authority from the President. Ehrlichman, supra.

C. The Defense of Mistake.

Suppose, however, that it were concluded that present Fourth Amendment standards equitably could be applied to the East Coast Project, and that under those standards the authorizations -- if any there were -- would be insufficient to justify the lengthy and deeply intrusive program that was actually carried out. The trial court, and the jury, then would be required to determine whether the defendants made a mistake, either of fact or of law, sufficient to make them not culpable for violation of 18 U.S.C.§1702.

Mistake of fact generally is recognized as a defense in criminal cases; mistake of law is not. The present case would present both kinds of defenses -- mistake of fact to the extent the defendants reasonably believed there was presidential authorization for the East Coast Project, if in fact there was none; and mistake of law to the extent the defendants reasonably believed that the authorization was legally sufficient, if in law it was not.

The mistake of fact defense might not have to be raised by the defendants, since under the circumstances of this case the prosecution would have difficulty establishing that no authorization in fact existed. Because of the age of the evidence, the deaths of important participants in the events and the striving for "plausible deniability" that led to an absence of written records, the prosecution would be unable to prove

beyond a reasonable doubt that there was no presidential authorization for the East Coast Project. It would therefore, for practical purposes, have to concede that the mail openings were authorized and to argue that the authorization was ineffective. This would make it unnecessary for the defendants to raise a mistake of fact defense; the prosecution simply could not prove beyond a reasonable doubt that there was no authorization.

This would then lead to the assertion of a mistake of law defense. Mistake of law generally is recognized as a defense in criminal prosecutions only when a law or an authoritative legal decision or interpretation misled the defendant reasonably to believe that his conduct was lawful.29/ Criminal convictions in such circumstances would impose criminal sanctions for conduct which the defendant could not reasonably have known was unlawful.30/ In any potential mail opening prosecution, however, the normal foundation for the defense would not be present. No statute or judicial decision ever affirmatively established or announced that the mail opening projects, or conduct closely analogous to them, were lawful, and Attorney General Mitchell's possible approval of the projects lacked any indicia of a formal considered opinion

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29/ See Model Penal Code §2.04(3)(b) (P.O.D. 1962).

30/ Cf. Bouie v. City of Columbia, 378 U.S. 347 (1964); Brief for the United States in Marks v. United States, No. 75-708, argued in the Supreme Court, November 1 and 2, 1976.

of law that the defense normally would require.

Notwithstanding this, the Department believes that the circumstances of the case could very well induce the trial court to instruct the jury on a mistake of law defense broader than that generally recognized, perhaps on the ground that a reasonable belief in lawful authority would negate the intent that section 1702 requires.31/ Indeed, in the recent decision of the District of Columbia Circuit Court in the Barker and Martinez case, the prevailing opinions of two judges concluded that expansive variants of the defense properly were available to defendants who, as private citizens, had assisted a White House official in what purported to be a national security search. Judge Wilkey concluded that the defense properly would

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31/ Certain staff documents prepared in the CIA at several points in the East Coast Project's operation expressed the view that, under generally applicable domestic statutes, mail opening was unlawful. These documents, however, were not prepared by attorneys; they were not, in any sense, considered legal judgments; they did not conclude that, because of unlawfulness, the project should be terminated. To the contrary, their point appears to have been that the apparent unlawfulness would seriously embarrass the Agency if the program were exposed, perhaps especially because the true purpose and authorization of the project could not be exposed in justification. The Department accordingly does not believe it likely that such documents can be taken as indicating that the defendants subjectively were aware that the project was legally unjustified, or refute their probable defense that they believed it proper in the exercise of presidential power, supervening generally applicable law, to protect the national security.

apply if the defendants could show facts justifying their reasonable reliance on the White House official's apparent authority and a legal theory justifying their belief that the apparent authority was lawful. Judge Merhige concluded that a defense would be available if the defendants reasonably relied on an apparent interpretation of lawful authority by the White House official.

Even if the trial court did not choose to give an expansive mistake of law instruction, the Department believes that considerations of fairness would lead the judge to allow the introduction of evidence bearing on the defendants' motives and the circumstances in which they acted -- evidence which would, in the Department's view, critically influence the jury's judgment.

D. Problems of Proof.

Even if the prosecution could overcome the argument that the East Coast Project was adequately authorized, and even if it could successfully meet the defense of mistake, it still would not follow that the prosecution would be successful. The prosecution must prove its entire case beyond a reasonable doubt. Once a defense going to any of the elements of the offense has been raised, the prosecution must respond by negating that defense beyond a reasonable doubt.32/

32/ See Mullaney v. Wilbur, 421 U.S. 684 (1975).

Problems of proof are difficult whenever the prosecution seeks to prove a crime that took place long ago. Statutes of limitations -- which for most federal crimes are five years -- are designed to alleviate these problems by creating a policy of repose for offenses not prosecuted within a few years of their commission.33/ Although the statute of limitations applicable to 18 U.S.C.§§1702 and 371 would allow a conspiracy prosecution for the entire East Coast Project so long as any overt act of the conspiracy (such as the opening of any envelope) were committed within five years of the date of the filing of the indictment, the technical permissibility of a prosecution could not overcome the enormous problems of proof entailed in establishing, beyond a reasonable doubt, criminal culpability for events that took place as long ago as 1953.

The clearest illustration of the difficulty in mounting a successful prosecution is the deaths of persons who were major participants in the events. Presidents Eisenhower, Kennedy and Johnson are dead; they cannot disclose what they knew of the East Coast Project or what they may have authorized. Allen Dulles, J. Edgar Hoover, Postmasters General, several directors of the operating divisions of the CIA -- all of them persons who may have given, sought, or obtained authorization, or controlled the scope or duration of the mail openings -- are dead.

33/ See generally the Brief for the United States in United States v. Lovasco, certiorari granted October 12, 1976, No. 75-18[illegible]

If documentary evidence reliably establishing authorization or lack of authorization existed, or if documentary evidence establishing personal responsibility for the scope or duration of the East Coast Project could be found, it might be possible to prosecute successfully despite the deaths of important persons. But the concept of "plausible deniability" led the principals to act without making a "paper trail" that could be used to reconstruct their acts. The absence of documentary evidence was intended to frustrate enemies or potential enemies and to protect Presidents; in practice, at least in this case, it also has the effect of frustrating the Department's ability to prove critical facts beyond a reasonable doubt in court. Whatever use this practice may have had, the understanding of the present state of the law articulated here by the Department of Justice requires that it be eliminated for reasons discussed in part III below.

The gaps and ambiguities in the evidence available in 1977 also would make it difficult to overcome a defense of mistaken reliance on what appeared to be proper authorization. In 1953, when the East Coast Project was begun, and for at least a substantial portion of the period of its operation, there was an acute consciousness on the part of the public and the government alike that serious foreign threats -- of both overt aggression

and covert subversion -- required extraordinary vigilance. There was widespread, if unjustified, belief that opposition to government policies, occasionally expressed violently, was generated, encouraged or supported by potentially hostile foreign powers. These concerns unquestionably affected perceptions of the government and of presidential power to respond by using covert activities. These attitudes were reflected in the men who authorized and conducted the mail openings program. The reasonableness of their attitudes would influence, in substantial part, the reasonableness of their beliefs that they were entitled to act as they did. A trial of this case therefore would open a searching inquiry into the perceptions of a generation of Americans; it would be, as Professor Wechsler put it during the course of his consultation with the Department, to "indict an era" and would raise fundamental jurisprudential questions concerning the application and use of the criminal law.

The defendants in any mail openings prosecution would be able to present circumstantial evidence to indicate that Director Allen Dulles secured President Eisenhower's approval for the East Coast program; at least, the potential defendants reasonably could have believed and apparently did believe, that he had. The potential defendants, in any event, continued a program already begun -- a program that, by the time Richard Helms became Director of Central Intelligence, had acquired a

bureaucratic momentum of its own. The Agency's highest officials could have had every reason to suppose that, within the government itself, the program was thought fully consistent with the government's purposes, responsibilities, and powers. Potential defendants could reasonably have believed that Presidents succeeding President Eisenhower, and other high officials of the government's intelligence establishment during this later period, knew at least in a general way of the fact that mail openings were taking place and, in a general way, acquiesced in the practice. Furthermore, certain senior officials of both the Kennedy and Johnson Administrations have stated to the Department that, although they knew neither their nature nor their scope, they personally were aware of the existence of mail openings and were convinced that the Presidents under whom they served must have known as well. In light of such evidence, the Department almost certainly would encounter the gravest difficulties in proving guilt beyond a reasonable doubt.

The weaknesses of the evidence, combined with the changes in the law during the course of the East Coast Project, make it unlikely that a prosecution could succeed. An unsuccessful prosecution in a case of this nature would be most undesirable.

It would not establish standards to guide future conduct; to the contrary, an acquittal might be perceived, rightly or wrongly, as an indication that programs such as the East Coast Project are not now illegal -- an indication that the Department of Justice believes would be most unfortunate. Moreover, either the trial judge or an appellate court, sensing the equities of the case and the possibility that the defendants may have labored under an erroneous, albeit reasonable, belief that they were entitled to act as they did, might expand the availability of a "mistake of law" defense more than the Department believes is warranted. A prosecution in this case would present the courts with the sort of hard facts that lead to bad law.

Even to institute a prosecution and to win it might be unfair. If the potential defendants in fact had a reasonable belief that they were acting pursuant to lawful presidential authorization, a prosecution so many years later could appear to be a vindictive kind of second-guessing. All the worse to use the criminal sanction in hindsight against individuals when what we now see as wrong was not so much the malign conduct of individuals as a disturbing and dangerous policy of government. Bringing a criminal prosecution, especially when it would in all likelihood fail, is not the only nor even the best way to establish rules of conduct. The enunciation

of a clear interpretation of the Constitution and the criminal law that stands from this time forward as a barrier against such activity, whether by rogue individual officials or by the creation of an illegal policy, avoids the high risk of failure at trial but assures that the criminal law can justly be brought to bear on any further conduct of this sort.

III. THE DEPARTMENT BELIEVES THAT CONDUCT SIMILAR TO THE EAST COAST PROJECT TODAY WOULD BE CLEARLY ILLEGAL

This report has dealt so far with the problems in bringing and winning a prosecution for the CIA's mail interception program. The attention to the difficulties in the case should not obscure the most important of the Department's conclusions -- that any program similar to the East Coast Project, if carried out today or in the future, would violate the law. The Department therefore would not hesitate to prosecute any persons, whatever their office, who may become involved in such a program.

The East Coast Project arguably was authorized by Presidents and their delegates during a time when the Fourth Amendment was understood to be less rigorous in its requirements. Such a program conducted today could not meet the requirement of authorization.

With respect to the present situation, Executive Order 11905 withdrew any prior authorization for CIA mail opening programs. That order, issued February 18, 1976, prohibits the national security agencies covered by the order from "[o]pening of mail or examination of envelopes of mail in the United States postal channels except in accordance with applicable statutes and regulations." No statute or regulation authorizes the CIA to open or read mail.

More important, however, the Department of Justice believes that the President lacks the authority to authorize a program comparable to the East Coast Project whether or not Executive Order 11905 continues in effect. This is so for a number of reasons. As this report has discussed above, the Executive Branch may exercise its constitutional authority to engage in certain forms of surveillance without the prior approval of the Judicial Branch only if it determines whether the facts justify the surveillance, renders a formal, written authorization, and places a time limitation upon the surveillance. The authorizing officer must act pursuant to an express, written delegation of presidential authority. The East Coast Project, and anything similar to it, would not satisfy these standards: much of the program was unreasonably broad in scope, it was not explicitly authorized in writing, and it was not subjected to frequent reexamination to determine whether continuation was appropriate. The requirement of a formal, written authorization means that

the "plausible deniability" concept may never again be used as an excuse for lack of evidence of lawful authority.

The establishment of a program of surveillance could be justified only by the President's foreign affairs powers. But the existence of such powers does not validate every action taken in their name. There must in each case be a sufficient basis, measured in light of the private interests the surveillance invades, for believing that the surveillance is necessary to serve the important end that purportedly justifies it. It must, in other words, be reasonable in scope and duration, as "reasonable" has come to be defined by the courts in cases involving wiretapping. No open-ended authorization of the sort involved in the East Coast Project would be sufficient. The Department does not suggest that this means that there must be probable cause to believe that every letter sought to be opened under such an authority would contain foreign intelligence information, any more than there must be probable cause to believe that every telephone call that might be overheard during a wire interception for criminal investigative purposes will include a discussion of crime. But there must, at a minimum,be a determination that the facts justify the surveillance and that it is no more intrusive

than is necessary to that end.34/ The standards that guide presidential conduct and the conduct of the Department of Justice draw their substance from the evolving principles of Fourth Amendment jurisprudence. Under those standards the East Coast Project could not now lawfully be approved.35/

34/ Cf. United States v. Martinez-Fuerte, 428 U.S. ____, 96 S. Ct. 3074 (1976) (cars may be stopped without probable cause or a warrant for a brief scrutiny, so long as the overall program of stopping cars is reasonable and productive); Camara v. Municipal Court, 387 U.S. 523 (1967) (warrants to search houses may be obtained on probable cause to believe that a building code violation has occurred).

Building on this and similar Supreme Court analyses, the Administration proposed legislation to provide for the issuance of a judicial warrant authorizing the use of electronic surveillance in foreign intelligence and foreign counterintelligence cases. That legislation would have required proof of probable cause that the target of the surveillance was a foreign power or an agent of a foreign power and a submission of a certification signed by a high level executive official that the information sought was necessary to the foreign intelligence or foreign counterintelligence needs of the federal government. It also required the court's review of procedures to minimize the acquisition and retention of extraneous information.

35/ See United States v. Brown, supra; United States v. Butenko, supra; United States v. Ehrlichman, supra. On the constitutional standards for the approval of domestic wiretaps, see Berger v. New York, 388 U.S. 41 (1967); Katz v. United States, supra; United States v. Kahn, 415 U.S. 143 (1974); United States v. Scott, 516 F.2d 751 (D.C. Cir. 1975); certiorari denied, 425 U.S. 917 (1976). Cf. United States v. Donovan, certiorari granted, 424 U.S. 907 (1976), argued October 13, 1976.

IV. CONCLUSION

The East Coast Project would now be illegal, and the Department would not hesitate to prosecute those who participated in such a program in the future. The applicable law has not always been so clear, however, so that a prosecution brought now for a course of conduct that spanned 1953 to 1973 might be unfair to defendants who believed that the program they were conducting began with presidential authorization and continued with this assumed authority. Finally, because of difficulties of proof that have been brought about by the lack of written documentation, the lapse of time, the fading of memories, and the deaths of key participants, the Department does not believe it could prove beyond a reasonable doubt that the potential defendants are criminally responsible for their participation in the mail opening program.

Questions of the legality of intelligence methods and of the scope and exercise of the national security power did not reach the courts until this decade. The preceding sections of this report have described the development, primarily in the last ten years, of Fourth Amendment law governing the use by the Executive Branch of surveillance that invades privacy, and the principles that the Department believes now govern its scope and exercise. But whatever can be said about the law now,

the Department believes at the time the potential defendants acted, there was a substantial basis for thinking that the law was otherwise. What would make the contemplated prosecution particularly unfair is the fact that ignorance of the developing law, and the consequent existence of erroneous assumptions of legality, were in large part the fault of the government, and indeed the Department of Justice itself. The Department's own attitudes toward mail openings as a means of gathering foreign intelligence must have appeared at least equivocal. Although after 1966 the FBI did not engage in mail opening, it participated in and was the primary beneficiary of the CIA's East Coast Project. On two occasions early in the 1960s the Department considered criminal prosecutions that would have been based in part on evidence derived from FBI mail openings. In each case the Department declined or withdrew prosecution. Whether it did so because it feared that the evidence would be excluded as illegally obtained, or whether it did so to avoid revealing the existence of the mail opening projects, the effect was the same: it allowed the programs to go on as before, and it did not instruct the FBI or the CIA to cease opening mail. What is more, in the mid-1960s, in connection with Senate subcommittee hearings on possible governmental monitoring of the mails, and again in the early 1970s,

the available evidence indicates that the then Attorneys General probably were informed generally of the CIA's activities and, in the latter instance, of their possible scope. Again, no steps were taken to determine what the programs encompassed or to question in any way their legality.

During the period in which the mail openings took place, there was no clear control to ensure that arguably valuable intelligence techniques would be employed only with careful attention to their legality and their effects on individual rights. The absence of defined control was perhaps in part the result of the necessary secrecy, even within the government, that attends intelligence operations, and of the desire for "plausible deniability" by the President. Whatever its cause, the failure of officials at the highest levels who were generally aware of these activities (though they did not participate in them) to clarify the law and establish institutional controls, and their apparent contentment to leave the individuals operating in this field to proceed according to their best estimates of legal constraints in a vague and yet vitally important area -- all this would render a prosecution by the government hypocritical. What really stands indicted as a result of the information which the Department's investigation has disclosed is the operation of the government as an institution: specifically, its failure to provide adequate guidance to its

subordinate officials, almost consciously leaving them to "take their chances" in what was an extremely uncertain legal environment.

One of the purposes, if indeed not the primary purpose, of the criminal law is not merely to punish past wrongdoing but to prevent wrongdoing in the future. If the present prosecution were the only way, or even an effective way, of achieving that result, it might be considered desirable despite elements of unfairness and the almost certain lack of success in obtaining convictions. It is of course recognized that whether a conviction could be achieved only can be determined by the bringing of a prosecution. The failure to convict, however, would hinder the development of the standards that we believe the law now establishes. The Department believes that the objective of preventing repetition of such activity can better be achieved by other means.

Substantial institutional changes in order to assure adequate protection for individual rights in the conduct of intelligence operations have already been made. Executive Order 11905 clearly delineates the proper responsibilities of each of the intelligence agencies and establishes a detailed structure of oversight and approval which includes substantial

participation by the Attorney General. Moreover, this report itself, which is a departure from normal Department practices, is meant to serve the purpose of clearly and publicly describing the Department's view of the current law. It serves as guidance for all federal officials acting in this area, and as fair notice that any failure in the future to comply with these newly developed but now clearly enunciated standards will result in prosecution.